No. 12376

# In the United States Court of Appeals for the Ninth Circuit

CITY AND COUNTY OF HONOLULU, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

*UPON APPEAL FROM THE UNITED STATES DISTRICT COURT, DISTRICT OF HAWAII*

## BRIEF FOR THE UNITED STATES


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### OPINION BELOW

The district court did not write an opinion. Its remarks at the close of the trial appear at pages 112-114 of the record.

### JURISDICTION

This is an appeal from an order entered July 20, 1949, fixing just compensation in a condemnation action (R. 64-66). Notice of appeal was filed September 14, 1949 (R. 69). The jurisdiction of the district court rested upon the Second War Powers Act of March 27, 1942, 56 Stat. 176, 177, sec. 201, 50 U.S.C. (1940 ed.) Supp. V. sec. 171a, as amended by the Act of December 20, 1944, 58 Stat. 827, 50 U.S.C. App. sec. 645. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1291.

### QUESTIONS PRESENTED

1. Whether the district court was correct in awarding only nominal damages for condemnation of the fee

title to the streets and highways of the City and County of Honolulu, when there was no necessity for relocating the streets and highways.

2. Whether the district court erred in determining such question without a jury.

STATEMENT

The order appealed from (R. 64-66) awards the Territory of Hawaii and the City and County of Honolulu nominal compensation for the streets and highways condemned by the United States.

On January 8, 1946, the United States instituted proceedings to condemn the fee simple title to 34.03 acres of land, more or less, constituting the streets, roads and highways (except Lehua Avenue) located at Pearl City Peninsula, Oahu, Territory of Hawaii, for use in connection with the Pearl Harbor Security Perimeter Acquisition (R. 2-8, 43-44). The petition was amended so as to insert a detailed description of the various streets and highways (R. 9-38). On March 31, 1947, a declaration of taking was filed and estimated just compensation of $2.00 was deposited with the court (R. 45-57).

When Pearl City Peninsula was taken by the Government, these streets belonging to appellant were "dead-end streets" in the sense that they ran into the water, but they served as a means whereby people in Honolulu could get into Pearl City (R. 111). The Government did not take Lehua Avenue, the main highway running through the center of the peninsula, and it is still being used by the public (R. 4, 114). The fee title to all but one or two per cent of the streets condemned was in the Territory of Hawaii (R. 97, Revised Laws of Hawaii 1945, Sec. 6112).[1] The fee

[1] On March 24, 1948, the Territory of Hawaii and the City and County of Honolulu stipulated that for the purposes of this pro-

to that one or two per cent was in the owners of the abutting land, subject to public easements of ingress and egress (R. 111-112).

On July 11, 1949, the case was heard by the court without a jury [2] (R. 72-115). Counsel for appellant conceded that there was no necessity to build substitute roads (R. 114). Appellant's only witness, the Executive Officer of the Public Lands Office, testified that the burden of maintaining the streets and the use thereof is vested in the City and County of Honolulu (R. 97). He further testified that a street may be abandoned by the Board of Supervisors if access is otherwise available. Describing the Board's procedure, he stated that the Board will do so if the abutting land owners are furnished with a substitute facility, and they are agreeable to the abandonment; but if no substitute facilities are being created, no new facilities are in mind, and the abutting owners have no access to their property and refuse to consent to have the street closed, the Board of Supervisors will not abandon it (R. 107-108). He further testified that at the time this property was condemned there had been no abandonment proceedings instituted or anticipated on these streets so far as he knew (R. 111).

Upon these facts the court, following the established rule, held that under the circumstances the appellant was entitled to only nominal compensation (R. 112-114). On July 20, 1949, an order fixing just com-

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ceeding, the City and County of Honolulu shall be deemed to be the owner of the fee and improvements of said streets and highways, and entitled to compensation for the taking thereof (R. 60-62). The United States joined in this stipulation for the sole purpose of recognizing the agreement (R. 61).

[2] Although appellant had filed a demand for a jury trial (R. 42), the court, with the acquiescence of appellant's counsel (R. 92), heard evidence relating to determination of the legal question involved, with the understanding that if appellant was entitled to substantial compensation, evidence as to the amount thereof would be taken later (R. 94).

pensation at One Dollar ($1.00) was entered (R. 64-66), from which this appeal was taken (R. 69).

ARGUMENT

## I

### The City and County of Honolulu Was Entitled to Only Nominal Compensation for the Taking of Its Streets and Highways

The Government agrees that streets and highways owned by local governments are "private property" within the meaning of the Fifth Amendment. By decisions of this Court, as well as other courts to which the question has been presented, it is now well settled that the correct measure of compensation for the taking of streets and highways is the cost of furnishing a substitute way if such relocation is necessary to serve persons outside the condemned area, and when, as here, there is no necessity for such relocation, only nominal compensation may be awarded. *State of California* v. *United States,* 169 F. 2d 914, 924 (C.A. 9, 1948); *United States* v. *Los Angeles County,* 163 F. 2d 124 (C.C.A. 9, 1947).[3]

It is clear that in the instant case, as admitted by counsel for appellant (R. 114), no relocation is necessary. It follows that the court below was clearly correct in its ruling that appellant was entitled to only nominal compensation. Pitching its argument principally against *United States* v. *Des Moines County,* 148 F. 2d 448 (C.C.A. 8, 1945), certiorari denied 326 U.S. 743, appellant argues at length that this line of decisions is wrong. We submit that the opinions of

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[3] *United States* v. *City of New York,* 168 F. 2d 387 (C.C.A. 2, 1948); *United States* v. *State of Arkansas,* 164 F. 2d 943 (C.C.A. 8, 1947); *Woodville* v. *United States,* 152 F. 2d 735 (C.C.A. 10, 1946), certiorari denied 328 U.S. 842 (1946); *United States* v. *Des Moines County,* 148 F. 2d 448 (C.C.A. 8, 1945), certiorari denied 326 U.S. 743; *Mayor and City Council of Baltimore* v. *United States,* 147 F. 2d 786 (C.C.A. 4, 1945); *Jefferson County* v. *Tennessee Valley Authority,* 146 F. 2d 564 (C.C.A. 6, 1945), certiorari denied 324 U.S. 871, rehearing denied 324 U.S. 891.

this Court and the other courts cited above demonstrate the soundness of the rule.[4] It arises from the fact that public streets exist for the purpose of giving access to abutting land and as a part of a street system to aid communication. The value of their construction attaches not to the streets themselves but to the land they make accessible. They have no market value. Neither the original cost nor the reproduction cost of the street, nor the square foot value of the land upon which they are located bears any relation to the amount of loss resulting from disruption of the communication which it provides. The readjustment of a street system may cost the city substantially more or substantially less than the square foot value of the land in the street taken. If more, the city would not be made whole by a payment based on the value of the land in the street; if less, it would receive an unwarranted windfall. It is this windfall for which appellant contends (Br. 29). Appellant's assertions relating to other publicly owned property (Br. 27-28) present no reason for awarding it the windfall it seeks upon the taking of its streets.

Appellant also argues that the settled rule does not apply here because appellant owned the fee title. But the essential nature of a street is the same whether the public owns the fee title or only an easement. Hence, this Court in *State of California* v. *United States,* 169 F. 2d 914 (C.A. 9, 1948), at page 924, stated:

> The doctrine applies with equal force whether the public entity owns the fee in the roadbed or merely holds title to an easement thereon as trustee for the benefit of the public. If, as here, the govern-

[4] As noted in *United States* v. *City of New York,* 168 F. 2d 387 (C.C.A. 2, 1948), the cases of *Town of Bedford* v. *United States,* 23 F. 2d 453 (C.C.A. 1, 1927), and *Town of Nahant* v. *United States,* 136 Fed. 273 (C.C.A. 1, 1905) (second hearing *United States* v. *Town of Nahant,* 153 Fed. 520 (C.C.A. 1, 1907)), relied upon by appellant (Br. 12-16), are in accord with the principle above stated.

mental unit owns the fee simple, the existence of the easement reduces the value of the public street or road to a nominal sum.

Similarly, in *United States* v. *City of New York*, 168 F. 2d 387 (C.C.A. 2, 1948), the "quite universally accepted rule" was applied to a case where the city owned the fee to land in the streets, and not merely an easement.[5] See also: *United States* v. *0.886 of an Acre of Land,* 65 F. Supp. 827 (E.D.N.Y. 1946). The fact, emphasized by appellant (Br. 31), that the streets involved in the *State of California, supra,* case were twenty feet under water does not aid appellant, since, as is apparent from this Court's opinion, the same rule was applied to those streets as to the streets which actually have been opened. The correctness of this Court's holding that the same rule applies whether the governmental unit owns fee title or an easement is emphasized by the fact that appellant does not own one or two per cent of the streets in issue. Fee title to those portions is held by abutting property owners subject to the public easement. It seems obvious that the same measure of compensation should be applied to all the streets condemned in this proceeding, and that it does not, as appellant urges, vary depending upon who owns the technical legal title.

Appellant stresses the argument that the streets might have been abandoned for such use, and the land thereupon sold or used for other purposes. But that does not change the fact that at the time of taking the streets existed as such. Thus, a similar authority to abandon streets existed in both *State of California* v. *United States,* 169 F. 2d 914 (C.A. 9, 1948), and

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[5] Washington Avenue, there involved, ran through the Wallabout Market area, which was owned in fee by the City of New York. See *United States* v. *City of New York*, 165 F. 2d 526 (C.C.A. 2, 1948); *United States* v. *25.4 Acres of Land,* 61 F. Supp. 251 (E.D.N.Y. 1945), 71 F. Supp. 255 (E.D.N.Y. 1947). See also R. 81-83.

*United States* v. *City of New York,* 168 F. 2d 387 (C.C.A. 2, 1948).[6] This, of course, does not mean that the Government is acquiring land without paying just compensation therefor. As long as the streets exist, their value is reflected in the abutting property to which they give access.[7] If the streets were abandoned, the land therein might have some salable value but at the same time the abutting property would be reduced in value because of the loss of access. *Mayor and City Council of Baltimore* v. *United States,* 147 F. 2d 786, 790 (C.C.A. 4, 1945). A similar contention was rejected long ago in *Chicago, Burlington &c. R'd.* v. *Chicago,* 166 U.S. 226, 250 (1896), where it was stated:

> Suppose the city had many years ago acquired the land in question by purchase or condemnation for the purpose of extending and had extended a street over it, and that the railroad company had thereafter acquired by condemnation the right to lay its tracks across the street upon making just compensation to the city. In ascertaining, in such a case, the compensation due the city, would it not be assumed, the street having once been opened, that the convenience of the public would always require it to be kept open, and that, therefore, compensation was to be ascertained, not upon the basis of the value of the city's land, as land, when crossed by the railroad tracks, but upon the basis that the land would always be a part of a public street? Both branches of this question must be answered in the affirmative.

Moreover, as the district court indicated (R. 112-113), it would be completely speculative whether the

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[6] Sec. 837 Deering's Cal. Codes; Sec. 383-2.0 Administrative Code of City of New York, page 416.

[7] Appellant recognizes this fact by its argument that substantial expenditures were made on the streets on the "calculated expectation of obtaining a substantial yield in taxes from the property that is served by such streets." (Br. 27).

streets would be so abandoned. In this regard, appellant's argument is similar to that unsuccessfully urged in the *City of Baltimore* case, *supra,* where it was held (page 791) that the possible use for alleys if the Government's need ceased and the property were returned to private ownership "is too speculative to furnish a basis for substantial damages." The speculative nature of the present claim was recognized by appellant's own witness who testified that no abandonment proceedings were anticipated on these streets (R. 111), and that assuming it had the power, the Board of Supervisors would not abandon the streets if it deprived abutting property owners of access, and if they did not consent to the closing (R. 107-108).

We submit that, as in the other situations where no substitute facility was necessary, appellant has suffered no loss and is not entitled to more than nominal compensation.[8]

## II

**The Court Below Did Not Err in Dispensing With a Jury Trial**

Appellant, relying entirely upon *Beatty* v. *United States,* 203 Fed. 620, 626 (C.C.A. 4, 1913) (Br. 39-40), asserts that under the Seventh Amendment it has a right to a jury trial. While we believe it is clear that the Seventh Amendment does not require a trial by jury in condemnation cases,[9] that question need not be decided here, since the Hawaiian condemnation statutes provide for jury trial on questions of fact in

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[8] The reference to possible mineral value (Br. 31) is plainly irrelevant, since there is no claim that valuable minerals underlie the streets here concerned (R. 86, 112-113).

[9] *Bauman* v. *Ross,* 167 U.S. 548, 593 (1897); *United States* v. *Jones,* 109 U.S. 513, 519 (1883); *United States* v. *243.22 Acres of Land,* 129 F. 2d 678, 684 (C.C.A. 2, 1942), certiorari denied *sub nom. Lambert* v. *United States,* 317 U.S. 698; *United States* v. *Meyer,* 113 F. 2d 387, 393 (C.C.A. 7, 1940), certiorari denied 311 U.S. 706; *Welch* v. *T.V.A.,* 108 F. 2d 95, 98-99 (C.C.A. 6, 1939), certiorari denied 309 U.S. 688; *United States* v. *Kennesaw Moun-*

respect to the value of land taken. *United States* v. *Honolulu Plantation Co.,* 122 Fed. 581, 585-588 (C.C.A. 9, 1903). However, "there is no constitutional right to have twelve men sit idle and functionless in a jury-box." *United States* v. *243.22 Acres of Land,* 129 F. 2d 678, 684 (C.C.A. 2, 1942), certiorari denied *sub nom. Lambert* v. *United States,* 317 U.S. 698. Since, as we have shown under point I, appellant as a matter of law is entitled to no more than nominal compensation, no question of right to a jury trial is presented. Indeed, appellant's counsel made no objection to the procedure employed by the trial court (R. 92).

## CONCLUSION

For the foregoing reasons, it is submitted that the order of the district court should be affirmed.

Respectfully,

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*tain Battlefield Assn.,* 99 F. 2d 830, 834 (C.C.A. 5, 1938), certiorari denied 306 U.S. 646; *United States* v. *Hess,* 71 F. 2d 78, 80 (C.C.A. 8, 1934); *United States* v. *Honolulu Plantation Co.,* 122 Fed. 581, 585 (C.C.A. 9, 1903); see also Blair, *Federal Condemnation Proceedings and the Seventh Amendment,* 41 Harv. L. Rev. 29 (1927).

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